

HB0193S01 compared with HB0193

~~{deleted text}~~ shows text that was in HB0193 but was deleted in HB0193S01.

inserted text shows text that was not in HB0193 but was inserted into HB0193S01.

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Representative Karen Kwan proposes the following substitute bill:

INTIMATE IMAGE DISTRIBUTION PROHIBITION{ AMENDMENTS}

2021 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Karen Kwan

Senate Sponsor: Todd D. Weiler

LONG TITLE

General Description:

This bill ~~{addresses}~~creates the offense of the unlawful distribution of ~~{an intimate image or}~~ a counterfeit intimate image.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ ~~{prohibits}~~creates the offense of unlawful distribution of a counterfeit intimate image;
- ▶ ~~{modifies}~~creates the ~~{responsibility}~~offense of ~~{a hosting company with regard to the removal}~~aggravated unlawful distribution of a counterfeit intimate image ~~{or an~~

HB0193S01 compared with HB0193

~~intimate image;~~

~~— modifies levels of offenses}; and~~

- ▶ ~~{makes technical and conforming changes}~~ imposes penalties.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

~~{ — 76-5b-203, as last amended by Laws of Utah 2019, Chapter 378~~

~~— 76-5b-204, as enacted by Laws of Utah 2017, Chapter 434~~

~~† 77-36-1, as last amended by Laws of Utah 2020, Chapter 142~~

ENACTS:

76-5b-205, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section ~~{76-5b-203}~~ 76-5b-205 is ~~{amended}~~ enacted to read:

~~{76-5b-203}~~ 76-5b-205. ~~{ — Distribution}~~ Unlawful distribution of ~~{an intimate image or}~~ a counterfeit intimate image -- Penalty.

(1) As used in this section:

(a) "Child" means an individual under the age of 18.

(~~{a}~~ ~~{b}~~) "Counterfeit intimate image" means any visual depiction, photograph, film, video, recording, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, that has been edited, manipulated, or altered to depict the likeness of an identifiable individual and purports to, or is made to appear to, depict that individual's:

(i) exposed human male or female genitals or pubic area, with less than an opaque covering;

(ii) a female breast with less than an opaque covering, or any portion of the female breast below the top of the areola; or

(iii) the individual engaged in any sexually explicit conduct or simulated sexually

HB0193S01 compared with HB0193

explicit conduct.

~~{[(a)] (b) "Distribute" means selling, exhibiting, displaying, wholesaling, retailing, providing, giving, granting admission to, providing access to, or otherwise transferring or presenting an image to another individual, with or without consideration.~~

~~—— [(b)] (c) "Intimate image" means any visual depiction, photograph, film, video, recording, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, that depicts:~~

~~—— (i) exposed human male or female genitals or pubic area, with less than an opaque covering;~~

~~—— (ii) a female breast with less than an opaque covering, or any portion of the female breast below the top of the areola; or~~

~~—— (iii) the individual engaged in any sexually explicit conduct.~~

~~—— [(c)] (d) "Sexually explicit conduct" means actual or simulated:~~

~~—— (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;~~

~~—— (ii) masturbation;~~

~~—— (iii) bestiality;~~

~~—— (iv) sadistic or masochistic activities;~~

~~—— (v) exhibition of the genitals, pubic region, buttocks, or female breast of any individual;~~

~~—— (vi) visual depiction of nudity or partial nudity;~~

~~—— (vii) fondling or touching of the genitals, pubic region, buttocks, or female breast; or~~

~~—— (viii) explicit representation of the defecation or urination functions.~~

~~—— [(d)] (e) "Simulated sexually explicit conduct" means a feigned or pretended act of sexually explicit conduct that duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.~~

~~—— (2) An actor commits the offense of distribution of [intimate images] an intimate image if the actor knowingly [or], intentionally, or recklessly distributes to any third party any intimate image of an individual who is 18 years [of age] old or older and knows or should know that the distribution would cause a reasonable person to suffer emotional distress or harm, if:~~

HB0193S01 compared with HB0193

~~—— (a) the actor knows that the depicted individual has not given consent to the actor to distribute the intimate image;~~

~~—— (b) the intimate image was created by or provided to the actor under circumstances in which the individual has a reasonable expectation of privacy; and~~

~~—— (c) actual emotional distress or harm is caused to the person as a result of the distribution under this section.~~

~~—— (3) An actor commits the offense of distribution of a counterfeit intimate image if the actor knowingly, intentionally, or recklessly distributes to any third party any counterfeit intimate image that purports to depict an individual who is 18 years old or older and knows or should know that the distribution would cause a reasonable person to suffer emotional or physical distress or harm, if:~~

~~—— (a) the actor knows that the individual has not given consent to the actor to distribute the counterfeit intimate image;~~

~~—— (b) the counterfeit intimate image was created or provided to the actor without the knowledge or consent of the individual; and~~

~~—— (c) actual emotional or physical distress or harm is caused to the individual as a result of the creation or distribution under this section.~~

~~—— [(3)] (4) This section does not apply to:~~

~~—— (a) (i) lawful practices of law enforcement agencies;~~

~~—— (ii) prosecutorial agency functions;~~

~~—— (iii) the reporting of a criminal offense;~~

~~—— (iv) court proceedings or any other judicial proceeding; or~~

~~—— (v) lawful and generally accepted medical practices and procedures;~~

~~—— (b) an intimate image or a counterfeit intimate image if the individual portrayed in the image voluntarily allows public exposure of the image;~~

~~—— (c) an intimate image or a counterfeit intimate image that is portrayed in a lawful commercial setting; or~~

~~—— (d) an intimate image or a counterfeit intimate image that is related to a matter of public concern or interest.~~

~~—— [(4)] (5) (a) This section does not apply to an Internet service provider or interactive computer service, as defined in 47 U.S.C. Sec. 230(f)(2), a provider of an electronic~~

HB0193S01 compared with HB0193

~~communications service as defined in 18 U.S.C. Sec. 2510, a telecommunications service, information service, or mobile service as defined in 47 U.S.C. Sec. 153, including a commercial mobile service as defined in 47 U.S.C. Sec. 332(d), or a cable operator as defined in 47 U.S.C. Sec. 522, if:~~

~~—— (i) the distribution of an intimate image or a counterfeit intimate image by the Internet service provider occurs only incidentally through the provider's function of:~~

~~—— (A) transmitting or routing data from one person to another person; or~~

~~—— (B) providing a connection between one person and another person;~~

~~—— (ii) the provider does not intentionally aid or abet in the distribution of the intimate image or counterfeit intimate image; and~~

~~—— (iii) the provider does not knowingly receive from or through a person who distributes the intimate image or counterfeit intimate image a fee greater than the fee generally charged by the provider, as a specific condition for permitting the person to distribute the intimate image or counterfeit intimate image.~~

~~—— (b) This section does not apply to a hosting company, as defined in Section 76-10-1230, if:~~

~~—— (i) the distribution of an intimate image or counterfeit intimate image by the hosting company occurs only incidentally through the hosting company's function of providing data storage space or data caching to a person;~~

~~—— (ii) the hosting company does not intentionally engage, aid, or abet in the distribution of the intimate image[, and] or counterfeit intimate image;~~

~~—— (iii) the hosting company does not knowingly receive from or through a person who distributes the intimate image or counterfeit intimate image a fee greater than the fee generally charged by the provider, as a specific condition for permitting the person to distribute, store, or cache the intimate image[.] or counterfeit intimate image; and~~

~~—— (iv) the hosting company immediately removes the intimate image or counterfeit intimate image upon notice from a law enforcement agency, prosecutorial agency, or the individual purportedly depicted in the intimate image or counterfeit intimate image;~~

~~—— (c) A service provider, as defined in Section 76-10-1230, is not negligent under this section if it complies with Section 76-10-1231.~~

~~—— (6) (a) Reckless distribution of an intimate image or a counterfeit intimate image is a~~

HB0193S01 compared with HB0193

~~class B misdemeanor.~~

~~— [(5) (a)] (b) [Distribution] Except as provided in Subsection (6)(c), knowing or intentional distribution of an intimate image or a counterfeit intimate image is a class A misdemeanor [except under Subsection (5)(b)].~~

~~— [(b)] (c) [Distribution] Knowing or intentional distribution of an intimate image or a counterfeit intimate image is a third degree felony on a second or subsequent conviction for an offense under this section that arises from a separate criminal episode as defined in Section 76-1-401.~~

~~— Section 2. Section 76-5b-204 is amended to read:~~

~~— **76-5b-204. Sexual extortion -- Penalties.**~~

~~— (1) As used in this section:~~

~~— (a) "Adult" means an individual 18 years [of age] old or older.~~

~~— (b) "Child" means any individual under the age of 18.~~

~~— } (c) "Distribute" means the same as that term is defined in Section 76-5b-203. }~~

~~— (d) "Intimate image" means the same as that term is defined in Section 76-5b-203.~~

~~— (e) "Position of special trust" means the same as that term is defined in Section [76-5-401.1] 76-5-404.1.~~

~~— (f) "Sexually explicit conduct" means the same as that term is defined in [Subsection 76-5b-203(1)(c)] Section 76-5b-203.~~

~~— (g) "Simulated sexually }~~

~~(d) "Sexually explicit conduct" means the same as that term is defined in Section 76-5b-203.~~

~~(~~{h}~~~~e~~) "~~{Vulnerable adult}~~ Simulated sexually explicit conduct" means the same as that term is defined in Section ~~{76-5-111}~~ 76-5b-203.~~

~~(2) An ~~{individual who is 18 years old or older}~~ actor commits the offense of ~~{sexual extortion if the individual:~~~~

~~— (a) with an intent to coerce a victim to engage in sexual contact, in sexually explicit conduct, or in simulated sexually explicit conduct, or to produce, provide, or distribute an image, video, or other recording of any individual naked or engaged in sexually explicit conduct, communicates in person or by electronic means a threat:~~

~~— (i) to the victim's person, property, or reputation; or~~

HB0193S01 compared with HB0193

~~—— (ii) to distribute an~~ unlawful distribution of a counterfeit intimate image for video of; if the victim; or

~~—— (b) knowingly causes a victim to engage in sexual contact, in sexually explicit conduct, or in simulated sexually explicit conduct, or to produce, provide, or distribute any image, video, or other recording of any individual naked or engaged in sexually explicit conduct by means of a threat;~~

~~—— (i) to the victim's person, property, or reputation; or~~

~~—— (ii) to distribute an~~ actor knowingly or intentionally distributes a counterfeit intimate image for video of the victim;

~~—— (3) (a) Sexual extortion is a third degree felony.~~

~~—— (b) Aggravated sexual extortion of an adult is a second degree felony.~~

~~—— (c) Aggravated sexual extortion of a child or a vulnerable adult is a first degree felony.~~

~~—— (4) that the actor knows or should reasonably know would cause a reasonable person to suffer emotional or physical distress or harm, if:~~

(a) the actor has not received consent from the depicted individual to distribute the counterfeit intimate image; and

(b) the counterfeit intimate image was created or provided by the actor without the knowledge and consent of the depicted individual.

(3) An individual commits aggravated {sexual extortion when} unlawful distribution of a counterfeit intimate image if, in {conjunction with} committing the offense described in Subsection (2), {any of the following circumstances have been charged and admitted or found true in the action for the offense:

~~—— (a) the victim is a child or vulnerable adult;~~

~~—— (b) the offense was committed by the use of a dangerous weapon, as defined in Section 76-1-601, or by violence, intimidation, menace, fraud, or threat of physical harm, or was committed during the course of a kidnapping;~~

~~—— (c) the individual caused bodily injury or severe psychological injury to the victim during or as a result of the offense;~~

~~—— (d) the individual was a stranger to the victim or became a friend of the victim for the purpose of committing the offense;~~

~~—— (e) the individual, before sentencing for the offense, was previously convicted of any~~

HB0193S01 compared with HB0193

sexual offense:

—— (f) the individual occupied a position of special trust in relation to the victim;

—— (g) the individual encouraged, aided, allowed, or benefitted from acts of prostitution or sexual acts by the victim with any other individual, or sexual performance by the victim before any other individual, human trafficking, or human smuggling; or

—— (h) the individual caused the penetration, however slight, of the genital or anal opening of the victim by any part or parts of the human body, or by any other object.

—— (5) An individual commits a separate offense under this section:

—— (a) for each victim the individual subjects to the offense outlined in Subsection (2); and

—— (b) for each separate time the individual subjects a victim to the offense outlined Subsection (2):

—— (6) the individual depicted in the counterfeit intimate image is a child.

(4) This section does not {preclude an individual from being charged and convicted of a separate criminal act} apply to:

(a) (i) lawful practices of law enforcement agencies;

(ii) prosecutorial agency functions;

(iii) the reporting of a criminal offense;

(iv) court proceedings or any other judicial proceeding; or

(v) lawful and generally accepted medical practices and procedures;

(b) a counterfeit intimate image if the individual {commits the separate criminal act while the individual violates or attempts to violate this section.

—— (7) An {person} portrayed in the image voluntarily allows public exposure of the image;

(c) a counterfeit intimate image that is portrayed in a lawful commercial setting; or

(d) a counterfeit intimate image that is related to a matter of public concern or interest or protected by the First Amendment to the United States Constitution or Article I, Sections 1 and 15 of the Utah Constitution.

(5) (a) This section does not apply to an Internet service provider or interactive computer service, as defined in 47 U.S.C. Sec. 230 {, is not subject to liability}; (f)(2), a provider of an electronic communications service as defined in 18 U.S.C. Sec. 2510, a telecommunications service, information service, or mobile service as defined in 47 U.S.C. Sec. 153, including a commercial mobile service as defined in 47 U.S.C. Sec. 332(d), or a

HB0193S01 compared with HB0193

cable operator as defined in 47 U.S.C. Sec. 522, if:

(i) the distribution of a counterfeit intimate image by the Internet service provider occurs only incidentally through the provider's function of:

(A) transmitting or routing data from one person to another person; or

(B) providing a connection between one person and another person;

(ii) the provider does not intentionally aid or abet in the distribution of the counterfeit intimate image; and

(iii) the provider does not knowingly receive from or through a person who distributes the counterfeit intimate image a fee greater than the fee generally charged by the provider, as a specific condition for permitting the person to distribute the counterfeit intimate image.

(b) This section does not apply to a hosting company, as defined in Section 76-10-1230, if:

(i) the distribution of a counterfeit intimate image by the hosting company occurs only incidentally through the hosting company's function of providing data storage space or data caching to a person;

(ii) the hosting company does not intentionally engage, aid, or abet in the distribution of the counterfeit intimate image;

(iii) the hosting company does not knowingly receive from or through a person who distributes the counterfeit intimate image a fee greater than the fee generally charged by the provider, as a specific condition for permitting the person to distribute, store, or cache the counterfeit intimate image; and

(iv) the hosting company immediately removes the counterfeit intimate image upon notice from a law enforcement agency, prosecutorial agency, or the individual purportedly depicted in the counterfeit intimate image.

(c) A service provider, as defined in Section 76-10-1230, is not negligent under this section ~~{related to content provided by a user of the interactive computer service;~~

~~Section 3}~~ if it complies with Section 76-10-1231.

(6) This section does not apply to an actor who engages in conduct that constitutes a violation of this section to the extent that the actor is chargeable, for the same conduct, under Section 76-5b-201, sexual exploitation of a minor.

(7) (a) Except as provided in Subsection (7)(b), knowing or intentional unlawful

HB0193S01 compared with HB0193

distribution of a counterfeit intimate image is a class A misdemeanor.

(b) Knowing or intentional unlawful distribution of a counterfeit intimate image is a third degree felony on a second or subsequent conviction for an offense under this section that arises from a separate criminal episode as defined in Section 76-1-401.

(c) Except as provided in Subsection (7)(d), knowing or intentional aggravated unlawful distribution of a counterfeit intimate image is a third degree felony.

(d) Knowing or intentional aggravated unlawful distribution of a counterfeit intimate image is a second degree felony on a second or subsequent conviction for an offense under this section that arises from a separate criminal episode as defined in Section 76-1-401.

Section 2. Section **77-36-1** is amended to read:

77-36-1. Definitions.

As used in this chapter:

- (1) "Cohabitant" means the same as that term is defined in Section 78B-7-102.
- (2) "Department" means the Department of Public Safety.
- (3) "Divorced" means an individual who has obtained a divorce under Title 30, Chapter 3, Divorce.
- (4) "Domestic violence" or "domestic violence offense" means any criminal offense involving violence or physical harm or threat of violence or physical harm, or any attempt, conspiracy, or solicitation to commit a criminal offense involving violence or physical harm, when committed by one cohabitant against another. "Domestic violence" or "domestic violence offense" includes commission or attempt to commit, any of the following offenses by one cohabitant against another:
 - (a) aggravated assault, as described in Section 76-5-103;
 - (b) aggravated cruelty to an animal, as described in Subsection 76-9-301(4), with the intent to harass or threaten the other cohabitant;
 - (c) assault, as described in Section 76-5-102;
 - (d) criminal homicide, as described in Section 76-5-201;
 - (e) harassment, as described in Section 76-5-106;
 - (f) electronic communication harassment, as described in Section 76-9-201;
 - (g) kidnapping, child kidnapping, or aggravated kidnapping, as described in Sections 76-5-301, 76-5-301.1, and 76-5-302;

HB0193S01 compared with HB0193

- (h) mayhem, as described in Section 76-5-105;
- (i) sexual offenses, as described in Title 76, Chapter 5, Part 4, Sexual Offenses, and Section 76-5b-201, Sexual exploitation of a minor -- Offenses;
- (j) stalking, as described in Section 76-5-106.5;
- (k) unlawful detention or unlawful detention of a minor, as described in Section 76-5-304;
- (l) violation of a protective order or ex parte protective order, as described in Section 76-5-108;
- (m) any offense against property described in Title 76, Chapter 6, Part 1, Property Destruction, Title 76, Chapter 6, Part 2, Burglary and Criminal Trespass, or Title 76, Chapter 6, Part 3, Robbery;
- (n) possession of a deadly weapon with criminal intent, as described in Section 76-10-507;
- (o) discharge of a firearm from a vehicle, near a highway, or in the direction of any person, building, or vehicle, as described in Section 76-10-508;
- (p) disorderly conduct, as defined in Section 76-9-102, if a conviction of disorderly conduct is the result of a plea agreement in which the defendant was originally charged with a domestic violence offense otherwise described in this Subsection (4), except that a conviction of disorderly conduct as a domestic violence offense, in the manner described in this Subsection (4)(p), does not constitute a misdemeanor crime of domestic violence under 18 U.S.C. Sec. 921, and is exempt from the federal Firearms Act, 18 U.S.C. Sec. 921 et seq.;
- (q) child abuse, as described in Section 76-5-109.1;
- (r) threatening use of a dangerous weapon, as described in Section 76-10-506;
- (s) threatening violence, as described in Section 76-5-107;
- (t) tampering with a witness, as described in Section 76-8-508;
- (u) retaliation against a witness or victim, as described in Section 76-8-508.3;
- (v) unlawful distribution of an intimate image~~{ or counterfeit intimate image }~~, as described in Section 76-5b-203, or unlawful distribution of a counterfeit intimate image, as described in Section 76-5b-205;
- (w) sexual battery, as described in Section 76-9-702.1;
- (x) voyeurism, as described in Section 76-9-702.7;

HB0193S01 compared with HB0193

(y) damage to or interruption of a communication device, as described in Section 76-6-108; or

(z) an offense described in Subsection 78B-7-806(1).

(5) "Jail release agreement" means the same as that term is defined in Section 78B-7-801.

(6) "Jail release court order" means the same as that term is defined in Section 78B-7-801.

(7) "Marital status" means married and living together, divorced, separated, or not married.

(8) "Married and living together" means a couple whose marriage was solemnized under Section 30-1-4 or 30-1-6 and who are living in the same residence.

(9) "Not married" means any living arrangement other than married and living together, divorced, or separated.

(10) "Protective order" includes an order issued under Subsection 78B-7-804(3).

(11) "Pretrial protective order" means a written order:

(a) specifying and limiting the contact a person who has been charged with a domestic violence offense may have with an alleged victim or other specified individuals; and

(b) specifying other conditions of release under Sections 78B-7-802 or 78B-7-803, pending trial in the criminal case.

(12) "Sentencing protective order" means a written order of the court as part of sentencing in a domestic violence case that limits the contact a person who has been convicted of a domestic violence offense may have with a victim or other specified individuals under Section 78B-7-804.

(13) "Separated" means a couple who have had their marriage solemnized under Section 30-1-4 or 30-1-6 and who are not living in the same residence.

(14) "Victim" means a cohabitant who has been subjected to domestic violence.